

11 U.S.C. § 1141
11 U.S.C. § 1144
11 U.S.C. § 1127
11 U.S.C. § 1129

In re Boulders on the River, Inc., Case No. 692-64208-aer11

11/15/94

AER

Unpublished

The court confirmed debtor's second amended plan on April 14, 1993. The debtor incorporated into the plan a set of loan documents to evidence the post-confirmation claim and security interest of Gentra, the major secured creditor. After confirmation, the parties litigated issues pertaining to the allowance of Gentra's claim. Gentra also filed two motions to interpret the plan. The first sought an order directing the debtor to execute documents evidencing the post-confirmation debt in a form that meets the fair and equitable test of 11 U.S.C. § 1129(b) and an order construing the plan to require the debtor to promptly pay back payments that were suspended pending determination of the amount of Gentra's claim. The second sought an order interpreting the plan to provide that Gentra's secured claim matures on June 1, 2000.

The court denied Gentra's request for an order requiring the execution of different loan documents. The plan required loan documents identical to those attached to the plan unless the parties agreed to a substitute form. The court reasoned that the form of the loan documentation is a plan confirmation issue and Gentra is bound by the terms of the confirmed plan to the form of documents attached to the plan. The court indicated that Gentra could not avoid the effect of the confirmed plan by revoking confirmation under 11 U.S.C. § 1144 because there was no assertion that the confirmation order was procured by fraud and because the motion was filed more than 180 days after confirmation. The court also determined that Gentra could not modify the plan under 11 U.S.C. § 1127(b) because Gentra is not the debtor or proponent of the plan and because the plan has been substantially consummated.

The court agreed with Gentra that the plan requires the debtor to promptly make up payments that were suspended pending determination of Gentra's claim because if the payments are not made up, the claim would not be "amortized" as provided in the plan. The court also agreed with Gentra that under the plain language of the plan the maturity date of the Gentra claim should be fixed at June 1, 2000.

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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON

10 IN RE)
11 BOULDERS ON THE RIVER, INC.,) Case No. 692-64208-aer11
12)
13) MEMORANDUM OPINION
14 Debtor-in-possession.)

15 This matter comes before the court upon two separate motions
16 filed by Gentra Capital Corporation (Gentra) to interpret the
17 confirmed plan of reorganization in this case.

18 **BACKGROUND**

19 All statutory references are to the Bankruptcy Code, Title 11
20 United States Code, unless otherwise indicated.

21 The debtor, Boulders on the River, Inc., is the developer,
22 owner and operator of an apartment complex in Eugene, Oregon.
23 Gentra is the successor in interest to Pacific First Bank, the
24 major secured creditor that provided the capital for the
25 construction of this apartment complex.
26

1 The debtor filed its second amended plan in January, 1993; it
2 was confirmed by an order entered, herein, on April 14, 1993.¹
3 Pursuant to the plan, the debtor proposed a set of loan documents
4 to evidence Gentra's claim and security interest following
5 confirmation of the plan. The form of note and trust deed were
6 attached, as exhibits, to the debtor's plan of reorganization.
7 Although Gentra opposed confirmation of the debtor's plan, it did
8 not object to the form of these documents at or prior to
9 confirmation of the debtor's plan.
10

11 Following the confirmation of the debtor's plan, the debtor
12 objected to Gentra's claim. The debtor raised several issues in
13 its objection to the claim, concerning the appropriate interest
14 rate to be applied pre-confirmation, the allowability and the
15 amount of attorney's fees to be awarded to Gentra as part of its
16 allowed secured claim. This court entered its order resolving
17 these issues on July 15, 1994.

18 On May 20, 1994, Gentra filed its motion for order regarding
19 documentation of claim, interpreting plan. In that motion, Gentra
20 seeks an order directing the debtor to execute documents evidencing
21 Gentra's post-confirmation debt and security interest in a form
22 that meets the fair and equitable test of § 1129(b) and an order
23

24
25 ¹Gentra objected to confirmation of the debtor's plan of
26 reorganization. After the debtor's plan was confirmed, Gentra
appealed this court's order confirming the debtor's plan. By a
judgment entered February 28, 1994, the United States Bankruptcy
Appellate Panel of the Ninth Circuit affirmed this court's order
confirming the debtor's plan of reorganization.

1 construing the confirmed plan to require the debtor to promptly pay
2 the back payments that were suspended pending determination of the
3 amount of Gentra's claim. A subsequent motion for order
4 interpreting plan was filed by Gentra on August 15, 1994, in which
5 Gentra seeks an order of this court interpreting the plan to
6 require that Gentra's secured claim matures on June 1, 2000.

7 The debtor maintains that the form of loan documents attached
8 to the confirmed plan are controlling. In addition, it is the
9 debtor's position that its only obligation under the plan was to
10 begin making the regular monthly plan payments to Gentra promptly
11 after the determination of the amount of Gentra's claim which
12 occurred, herein, on July 15, 1994. Finally, the debtor maintains
13 that the maturity date for the Gentra indebtedness, based upon the
14 terms of the confirmed plan, is August 1, 2001.

15 **LOAN DOCUMENTS**

16 Gentra seeks an order of this court directing the debtor to
17 execute a promissory note and trust deed to evidence Gentra's post-
18 confirmation debt and security interest in a form that meets the
19 fair and equitable test of § 1129(b). Gentra does not believe that
20 the form of promissory note and trust deed attached to the plan
21 satisfy the requirements of § 1129(b) of the Code. Gentra's
22 specific objections to the documents are as follows:

23 Trust Deed

- 24
- 25 1. Paragraph 1 of debtor's form of trust deed does not
26 adequately describe the full indebtedness to be covered
by the trust deed.

2. Debtor's form of trust deed has deleted standard warranties of title and covenants to keep the property free and clear of liens without Gentra's consent.
3. Debtor's form of trust deed does not require debtor to maintain a tax and insurance reserve.
4. Debtor's form of trust deed has insufficient financial reporting provisions, requiring only semi-annually reporting of the financial status of the project.

Promissory Note

1. Debtor's promissory note contains a very restrictive default provision, providing for a default only upon failure to make payments. The prior note included a number of other bases for acceleration, such as breach of trust deed obligations, removal or demolition of improvements, and failure to abide by other covenants in the other loan documents.
2. Debtor's promissory note does not provide for a default interest rate.
3. Debtor's promissory note modifies the procedure for computing interest.
4. Debtor's promissory note does not include any provisions for assessing prepayment premiums.
5. Debtor's promissory note generally fails to include protections and rights available to Gentra under its original note.

Gentra has submitted the Affidavit of James C. Lancaster in support of Gentra's motion, dated May 18, 1994. In this affidavit, Mr. Lancaster explains that Gentra expressed its concerns, as set forth above, regarding the loan documents, to debtor's counsel prior to the confirmation of debtor's plan. He indicates that the parties elected to defer resolving the matters related to the form of the loan documents since such issues would become moot if confirmation of the plan had been denied or if the order confirming

1 the plan had been reversed on appeal. There were extensive
2 negotiations between Gentra and the debtor and many of the
3 concerns, set forth above, were resolved by negotiation.
4 Eventually, however, the parties reached an impasse with the debtor
5 taking the position that the form of documents attached to the plan
6 are controlling. Hence, this motion. In support of its motion,
7 Gentra has submitted documents that it believes would be
8 satisfactory. Gentra argues that the parties agreed to reserve
9 issues regarding the documentation of Gentra's claim until after
10 confirmation. Since negotiations between the parties have broken
11 down, the court should now interpret the plan and determine the
12 appropriate documentation to evidence Gentra's post-confirmation
13 secured claim.
14

15 The debtor does not dispute Gentra's assertions regarding the
16 status of the parties' negotiations. It maintains, that absent
17 mutual agreement, the provisions of the confirmed plan control.
18 Further, the debtor argues that Gentra's motion should be considered
19 as a motion to modify the confirmed plan. The debtor argues that
20 this plan has been substantially consummated, therefore, this court
21 lacks the authority to modify the plan.²
22

23 **Discussion.**

24 Gentra correctly notes that the order confirming plan was
25 entered, in this case, by way of cram down. Accordingly, the
26

²Gentra does not dispute the debtor's assertion that the plan has been substantially consummated.

1 requirements of § 1129(b) must be met. Section 1129(b)(1) provides
2 in part as follows:

3 . . .[T]he court, on request of the proponent of the
4 plan, shall confirm the plan . . . if the plan does not
5 discriminate unfairly, and is fair and equitable, with
6 respect to each class of claims or interests that is
impaired under, and has not accepted, the plan.

7 Gentra maintains that the loan documents attached to the plan
8 are not fair and equitable. Gentra relies upon § 1129(b)(2)(A)
9 which provides as follows:

10 (2) For the purpose of this subsection, the condition
11 that a plan be fair and equitable with respect to a class
includes the following requirements:

12 (A) With respect to a class of secured claims, the plan
13 provides-

* * *

14 (iii) for the realization by such holders of the
15 indubitable equivalent of such claims.

16 Gentra argues that the loan documents attached to the plan
17 fail to meet the statutory standard set forth above since they do
18 not contain a number of lender protection provisions typically
19 found in commercial loan documents as set forth above in this
20 opinion on pp. 3-4.

21 Gentra relies upon In re Bernard, 70 B.R. 181 (Bankr. E.D.
22 Ark. 1986) and other cases to support its position.

23 In Bernard, the court held that in order for the creditor to
24 realize the indubitable equivalent of its claims, the debtor must
25 propose to execute a new mortgage or deed of trust "[C]ontaining
26 substantially the same terms and conditions as the original

1 promissory note." Id. at 186. See also In re American Mariner
2 Industries, 734 F.2d 426 (9th Cir. 1984).

3 Gentra is treated as Class 3 in the confirmed plan. The
4 pertinent provisions of the confirmed plan are as follows:

5 3. The obligation shall be evidenced by a promissory
6 note which is, in form and substance, identical to the
7 one attached hereto as Exhibit A, unless the Debtor and
8 the Class 3 claimant mutually agree to substitute
therefore, the Class 3 claimants standard form promissory
note. (emphasis added)

9 4. The creditor's rights in its collateral shall, upon
10 confirmation, be defined by the Trust Deed, Assignment of
11 Rents and Security Agreement, attached as Exhibits D, E and F
12 respectively, which shall supplant and replace all existing
13 agreements between the creditor and the debtor concerning the
14 creditor's rights in the collateral. All pre-petition
15 evidences of indebtedness, security agreements and loan
16 agreements shall be deemed to be of no further force and
17 effect.

18 Debtor's Second Amended Plan of Reorganization, V.C., pp. 3 - 4.

19 It is now well-settled that a bankruptcy court's
20 confirmation order is a binding, final order, accorded
21 full res judicata effect and precludes the raising of
22 issues which could or should have been raised during the
23 pendency of the case, such as typical lender liability
24 causes of action.

25 Heritage Hotel Partnership, I v. Valley Bank of Nevada, (In re
26 Heritage Hotel Partnership I), 160 B.R. 374, 377 (9th Cir. BAP
1993).

In other words, a party in interest . . . is bound by the
terms of the plan when confirmed, even if the plan
ultimately provides it with less than that to which it is
otherwise legally entitled.

In re St. Louis Freight Lines, Inc., 45 B.R. 546, 552 (Bankr. E.D.
Mich. 1984).

1 It is clear that the issue raised by Gentra concerning the
2 loan documentation is a confirmation issue which Gentra should have
3 raised prior to confirmation of the plan. Since this court's order
4 confirming the plan is accorded full res judicata effect, Gentra
5 may not now raise the issue.

6 It is clear that the plan provides that the parties, by mutual
7 agreement, could agree to substitute loan documents different than
8 those attached to the confirmed plan. Since such agreement has not
9 been reached, however, the form of loan documents attached to plan
10 control.

11 This court notes the provisions of § 1144 which provides, in
12 part, as follows:

13 On request of a party in interest at any time before 180
14 days after the date of the entry of the order of
15 confirmation, . . . the court may revoke such order if
16 and only if such order was procured by fraud.

17 Here, Gentra does not assert that the order of confirmation was
18 procured by fraud. In addition, Gentra's motion was filed in May,
19 1994, well after 180 days after the order of confirmation had been
20 entered. Accordingly, this court may not revoke the order
21 confirming the debtor's plan.

22 In the alternative, the court could, as the debtor suggests,
23 treat Gentra's motion as a motion to modify the confirmed plan.
24 Post-confirmation modification of a confirmed Chapter 11 plan is
25 governed by § 1127(b) which provides, in part, as follows:

26 The proponent of a plan or the reorganized debtor may
modify such plan at any time after confirmation of such

1 plan and before substantial consummation of such
2 plan, . . .

3 Here, Gentra is not the proponent of the plan or the
4 reorganized debtor. In addition, it is uncontroverted that the
5 plan has been substantially consummated. Accordingly, this court
6 agrees with the position taken by the debtor that this court may
7 not, at this time, modify the plan as requested by Gentra.

8 Accordingly, this court concludes that Gentra's request to
9 substitute loan documents different from those attached to the
10 confirmed plan should be denied.

11 Payments

12 The parties disagree about the timing and amount of payments
13 to be made to Gentra following this court's determination of its
14 allowed secured claim. The pertinent provisions in the plan
15 regarding payment of Gentra's claim are paragraph V.C., page 3, and
16 paragraph X.B., page 8. Paragraph V.C. provides:

17 1. [Gentra's] Claim shall bear interest at the Market
18 Rate and shall be paid in equal monthly installments
19 which would amortize the Claim over a period of 360
20 months. . .³

21 2. The first payment on the Claim shall be due on the
22 15th day of the first full month following the Effective
23 Date of the Plan.

24 Paragraph X.B. provides:

25 Notwithstanding any provision of the Plan specifying a
26 date or time for payment or distribution of consideration
hereunder, payments and distributions with respect to any

³The amortization period was changed to 300 months in the order confirming the plan.

1 Claim that at such date or time is disputed, . . . shall
2 not be made until a Final Order has been Filed with
3 respect to such objection . . . Thereafter such payments
and distributions shall be made promptly.

4 The plan defines "effective date" as the first business day:

- 5 1. That is at least 30 days after the Confirmation Date;
6 2. On which no stay of the confirmation order is in effect;
7 and
8 3. On which all conditions to Confirmation and Effective
9 Date have been met.

10 Second Amended Plan of Reorganization, page 12.

11 After the determination of Gentra's allowed secured claim,
12 pursuant to an order of this court entered on July 15, 1994, the
13 debtor executed and provided to Gentra a promissory note dated
14 April 14, 1993 providing for monthly payments of \$113,679.69
15 commencing August 15, 1994, with the balloon payment due on August
16 1, 2001.

17 Gentra argues that the debtor should "promptly" pay those
18 monthly payments due under paragraph V.C. but suspended by the
19 operation of paragraph X.B. while the amount of Gentra's claim was
20 in litigation; in other words, make up the suspended payments. The
21 debtor maintains that as soon as the amount of Gentra's claim was
22 determined, it had an obligation to begin making the regular
23 monthly payments; there is no obligation, under the plan, to
24 "catch-up".
25

26 The parties disagree about the meaning of the phrase;
"Thereafter such payments and distributions shall be made

1 promptly." Gentra correctly notes that any ambiguities in the plan
2 should be construed against the proponent. In re Mako, Inc., 127
3 B.R. 474 (Bankr. E.D. Ok. 1991).

4 This court is most persuaded, however, by the arguments made
5 by Gentra in its supplemental memorandum filed August 15, 1994,
6 supported by the Affidavit of James C. Lancaster in Support of
7 Motions for Order Interpreting Plan dated August 12, 1994.

8 Gentra notes that \$1,633,344.45 in interest has accrued on its
9 claim between the time when the plan was confirmed and August 15,
10 1994, the date when the debtor concedes payments should commence.⁴
11 Accordingly, if the debtor simply commences regular payments on
12 August 15, 1994, and is not required to make up the suspended
13 payments, the plan will not "amortize". In short, the debt owing
14 to Gentra will be greater on the date that the balloon payment is
15 to be made than at the time of confirmation. Indeed, the debt
16 could not be amortized over 300 months due to the large amount of
17 accrued interest.

18
19 The plan provides that Gentra's claim will be paid in equal
20 monthly installments which would amortize the claim over a period
21 of [300] months. Black's Law Dictionary, 76 (5th Ed. 1979) defines
22 "amortization" as "A reduction in a debt or fund by periodic
23 payments covering interest and part of principal," and further
24 states that "An 'amortization plan' for the payment of an
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26

⁴The debtor has not disputed Gentra's mathematical computations.

1 indebtedness is one where there are partial payments of the
2 principal, and accrued interest, at stated periods for a definite
3 time, at the expiration of which the entire indebtedness will be
4 extinguished."

5 Under this definition, Gentra's claim is not "amortized" over
6 300 months. According to the spreadsheet attached to the affidavit
7 referred to above, if the debtor continued to make the regular
8 monthly payments of \$113,679.69 provided for in the note for the
9 full 300 months, the remaining principal balance, owing to Gentra
10 would be \$9,278,716.75.
11

12 During the 84 month period provided for in the plan, the plan
13 would be a "negative amortization" plan. This is clearly contrary
14 to the proposed treatment for Class 3, (Gentra) in the confirmed
15 plan.

16 Accordingly, this court agrees with the position taken by
17 Gentra that the debtor should be required to promptly make up the
18 suspended payments. The full amount of the suspended payments
19 should be made not later than the regular monthly payment to be
20 paid to Gentra on December 15, 1994.
21

22 **MATURITY DATE**

23 Following the determination, by this court, of Gentra's
24 allowed secured claim on July 15, 1994, the debtor provided Gentra
25 with a promissory note indicating a maturity date of August 1,
26 2001, a date which is 84 months after the first monthly payment

1 provided for in the note, August 15, 1994. Gentra maintains that
2 the maturity date should be set at June 1, 2000.

3 Section V.C. of the confirmed plan sets out the terms of
4 repayment to Gentra and provides:

5 1. The Fully Secured Claim shall bear interest at the
6 Market Rate and shall be paid in equal monthly installments
7 Notwithstanding the period of amortization, the entire Claim
8 shall become due and payable on the first day of the month
9 following the date on which the 84th scheduled monthly payment
10 is due. (emphasis added)

11 2. The first payment on the Claim shall be due on the
12 15th day of the first full month following the Effective Date
13 of the Plan.

14 The effective date of the plan was May 14, 1993, the first
15 business day that was at least 30 days after the order confirming
16 the plan was entered. The first scheduled payment to Gentra would
17 be June 15, 1993, the fifteenth day of the first full month
18 following the effective date of the plan. Accordingly, Gentra
19 maintains that the maturity date should be June 1, 2000, the first
20 day of the month following the date on which the 84th monthly
21 payment is due, May 15, 2000.

22 This court agrees with the position taken by Gentra. The
23 balloon payment is calculated by reference to the eighty-fourth
24 scheduled monthly payment and has no reference as to when payments
25 are actually made. Thus, the suspension of payments that occurred
26 because Gentra's claim was in litigation, should not effect the
final maturity date.

CONCLUSION

1 Based upon the foregoing, this court concludes that Gentra's
2 motion to require the debtor to execute loan documentation,
3 different in form than the documents attached to the confirmed plan
4 should be denied, but that Gentra's motion to require the debtor to
5 promptly make up suspended payments should be granted and that the
6 final maturity date or balloon payment for the Gentra claim should
7 be fixed at June 1, 2000.

8 This opinion includes the court's findings of fact and
9 conclusions of law; they shall not be separately stated. An order
10 consistent herewith shall be entered.
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14 ALBERT E. RADCLIFFE
15 Bankruptcy Judge
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